



6712-01

## **FEDERAL COMMUNICATIONS COMMISSION**

### **47 CFR Parts 1 and 73**

**[AU Docket No. 17-329; DA 18-1038]**

### **Auction of Cross-Service FM Translator Construction Permits; Comment Sought on Competitive Bidding Procedures for Auction 100**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule; proposed auction procedures.

**SUMMARY:** The Wireless Telecommunications and Media Bureaus (Bureaus) announce an auction of certain cross-service FM translator construction permits. This document also seeks comment on competitive bidding procedures and proposed minimum opening bids for Auction 100.

**DATES:** Comments are due on or before November 15, 2018, and reply comments are due on or before November 28, 2018.

**ADDRESSES:** Interested parties may submit comments in response to the Auction 100 Comment Public Notice by any of the following methods:

- **FCC's Website:** Federal Communications Commission's Electronic Comment Filing System (ECFS): <http://apps.fcc.gov/ecfs>. Follow the instructions for submitting comments.
- **Mail:** FCC Headquarters, 445 12th Street SW, Room TW-A325, Washington, DC 20554.
- **People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, or audio format), send an e-mail to [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

For detailed instructions for submitting comments, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** For auction legal questions, Lynne Milne in the Wireless Telecommunications Bureau's Auctions and Spectrum Access Division at (202) 418-0660. For general auction questions, the Auctions Hotline at (717) 338-2868. For FM translator service questions,

James Bradshaw, Lisa Scanlan or Tom Nessinger in the Media Bureau's Audio Division at (202) 418-2700.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Auction 100 Comment Public Notice in AU Docket No.17-329, DA 18-1038, released on October 19, 2018. The complete text of this document, including its attachment, is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW, Room CY-A257, Washington, DC 20554. The Auction 100 Comment Public Notice and related documents also are available on the internet at the Commission's website: <https://www.fcc.gov/auction/100/>, or by using the search function for AU Docket No. 17-329 on the Commission's ECFS web page at <https://www.fcc.gov/ecfs/>.

All filings in response to the Auction 100 Comment Public Notice must refer to AU Docket No. 17-329. The Bureaus strongly encourage interested parties to file comments electronically, and request that an additional copy of all comments and reply comments be submitted electronically to the following address: [auktion100@fcc.gov](mailto:auktion100@fcc.gov).

Electronic Filers: Comments may be filed electronically using the Internet by accessing ECFS: <http://apps.fcc.gov/ecfs>. Follow the instructions for submitting comments.

Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission (FCC). All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to the FCC Headquarters at 445 12th Street SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. Eastern Time (ET). All hand deliveries must be held together with rubber bands or fasteners. Any envelope or box must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445

12th Street SW, Washington, DC 20554.

## **I. INTRODUCTION**

1. On December 4, 2017, the Bureaus announced a second auction filing window for AM broadcasters seeking new cross-service FM translator station construction permits. By this Public Notice, the Bureaus seek comment on the procedures to be used for Auction 100. Auction 100 will be a closed auction: only those entities listed in Attachment A of the Auction 100 Comment Public Notice will be eligible to participate further in Auction 100.

2. The Bureaus anticipate that the bidding for Auction 100 will commence in fiscal year 2019. The Bureaus will announce a schedule for bidding in Auction 100 by public notice, to provide applicants with sufficient time to submit upfront payments and prepare for bidding in the auction.

## **II. CONSTRUCTION PERMITS IN AUCTION 100**

3. Auction 100 will resolve by competitive bidding mutually exclusive (MX) engineering proposals for construction permits for up to 13 new cross-service FM translator stations. The locations and channels of these proposed stations are identified in Attachment A of the Auction 100 Comment Public Notice. Attachment A also specifies a proposed minimum opening bid and a proposed upfront payment amount for each construction permit listed.

4. An applicant listed in Attachment A may become qualified to bid only if it complies with the additional filing, qualification, and payment requirements, and otherwise complies with applicable rules, policies, and procedures. Each qualified bidder will be eligible to bid on only those construction permits specified for that qualified bidder in Attachment A of the Auction 100 Comment Public Notice. All of the engineering proposals in each MX group are directly mutually exclusive with one another; therefore, no more than one construction permit will be awarded for each MX group identified in Attachment A. Under the Commission's established precedent, once mutually exclusive applications are accepted for a construction permit and thus mutual exclusivity exists for auction purposes, an applicant cannot obtain a construction permit without placing a bid, even if no other applicant for that particular construction permit becomes qualified to bid or in fact places a bid.

5. The Commission adopted eligibility criteria for filing window opportunities in its 2015 AM Radio Revitalization rulemaking order. Chesapeake-Portsmouth Broadcasting Corporation requested a waiver of the eligibility restriction for the Auction 100 filing window opportunity. MHR License LLC filed an objection to this waiver request. The Bureaus intend to address the Chesapeake-Portsmouth waiver request by the release of the public notice establishing procedures for Auction 100.

### **III. PROCESSING OF SHORT-FORM APPLICATIONS (FCC FORM 175) AND MINOR CORRECTIONS**

#### **A. Initial Review of FCC Form 175**

6. Applicants listed in Attachment A to the Auction 100 Comment Public Notice previously filed short-form applications (FCC Form 175). The Bureaus will process the Forms 175 filed by the 25 applicants listed in Attachment A to determine which are complete, and subsequently will issue a public notice identifying those that are complete and those that are incomplete or deficient because of minor defects that may be corrected. That public notice will provide instructions for applicants to make only minor corrections to their Forms 175. The public notice will include a deadline for resubmitting corrected Forms 175.

#### **B. Updates to Auction Applications Outside of Filing Windows**

7. As required by 47 CFR 1.65, an applicant must maintain the accuracy and completeness of information furnished in its pending application and must notify the Commission of any substantial change that may be of decisional significance to that application. Thus, section 1.65 requires an auction applicant to notify the Commission of any substantial change to the information or certifications included in its pending short-form application. See also 47 CFR 1.2105(b)(4), (c).

8. If information needs to be submitted pursuant to sections 1.65 or 1.2105 outside of the upcoming resubmission window in Auction 100, the applicant must submit a letter briefly summarizing the changes by email to [auCTION100@fcc.gov](mailto:auCTION100@fcc.gov). Such email must include a subject or caption referring to Auction 100 and the name of the applicant. If any information needs to be submitted during the upcoming resubmission window pursuant to sections 1.65 or 1.2105, that information must be submitted

within an Auction 100 applicant's Form 175.

#### **IV. BUREAUS SEEK COMMENT ON PROCEDURES FOR AUCTION APPLICATIONS**

9. The Bureaus previously announced that section 1.2105(a)(3)'s prohibition on the filing of more than one auction application (Form 175) in an auction by entities with any of the same controlling interests would be waived for Auction 100 applicants in recognition of the specific eligibility provisions and filing procedures established by the Commission for this cross-service FM translator filing window. Thus, entities controlled by the same individual or set of individuals were permitted to file separate short-form applications for Auction 100.

10. The rule provision that was waived in the Auction 100 Filing Instructions Public Notice, section 1.2105(a)(3), was adopted in 2015 in conjunction with other rule changes. Under section 1.2105(a), as revised in 2015, each auction applicant must certify that it has disclosed any arrangements or understandings of any kind relating to the licenses being auctioned to which it (or any party that controls or is controlled by it) is a party, and must certify that it (or any party that controls or is controlled by it) has not entered and will not enter any arrangement or understanding of any kind relating directly or indirectly to bidding at auction with, among others, any other applicant for the auction. Also in 2015, section 1.2105(c) was extended to prohibit communication of bids or bidding strategies between any applicants for an auction, and thus is no longer limited to a communication between applicants that had applied for construction permits to serve the same area. In addition, the 2015 revisions to that rule removed a prior exception to section 1.2105(c) under which applicants that had entered into bidding-related agreements could engage in certain communications so long as each entity had disclosed the other as a party to such an agreement on its auction application, pursuant to section 1.2105(a)(2)(viii). In applying the prohibited communications rule, the Bureaus have found that, where an individual served as an officer or director for two or more applicants subject to the rule, the bids and bidding strategies of one applicant are presumptively conveyed to the other applicant. Consequently, the Bureaus determined that, absent a disclosed bidding agreement between such applicants creating an applicable exception under the prior rule, an apparent violation of section 1.2105(c) would occur. Finally, in a change related to the

prohibition on joint bidding agreements and the changes to the prohibited communications rule, revised section 1.2105(a)(2)(iii) now prohibits any individual from serving as an authorized bidder of more than one applicant.

11. In recognition that some Auction 100 applicants under common control may have filed separate Forms 175 relying on the waiver of section 1.2105(a)(3), the Bureaus seek comment on whether it would be appropriate to waive or modify for Auction 100 the application of certain other provisions of section 1.2105 so that such applicants will not thereby violate such other provisions of the rule. For instance, in the absence of relief, such applicants could be at risk of violating section 1.2105(c) because the Commission presumes that bidding strategies are communicated between entities that share a common officer or director. Moreover, current rules bar most kinds of joint bidding agreements that may have, under the prior rule, permitted certain communications between commonly controlled entities or other auction applicants under the former rules.

12. Accordingly, the Bureaus seek comment on whether it would be appropriate to waive or modify the application of section 1.2105 provisions so that Auction 100 applicants relying on the waiver of section 1.2105(a)(3) will not thereby violate such other provisions. Commenters may wish to consider the Bureaus' prior observations regarding circumstances under which competitive bidding rules might be waived or modified in particular situations and should review carefully that discussion in the Auction 100 Comment Public Notice and references in that section.

## **V. BUREAUS SEEK COMMENT ON BIDDING PROCEDURES**

13. The Bureaus, under delegated authority, seek comment on multiple issues relating to the conduct of Auction 100.

### **A. Auction Structure**

14. *Simultaneous Multiple Round Auction Design.* The Bureaus propose to use the Commission's standard simultaneous multiple-round auction format for Auction 100. This type of auction offers every construction permit for bidding at the same time and consists of successive bidding

rounds in which eligible bidders may place bids on individual construction permits. Typically, bidding remains open on all construction permits until bidding stops on every construction permit. The Bureaus seek comment on this proposal.

15. *Bidding Rounds.* Auction 100 will consist of sequential bidding rounds, each followed by the release of round results. The Commission will conduct Auction 100 over the internet using the FCC auction bidding system. Qualified bidders will also have the option of placing bids by telephone through a dedicated auction bidder line.

16. The Bureaus propose to retain the discretion to change the bidding schedule to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. Under this proposal, the Bureaus may change the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. The Bureaus seek comment on this proposal. Commenters on this issue should address the role of the bidding schedule in managing the pace of the auction, specifically discussing the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirements or bid amount parameters, or by using other means.

17. *Stopping Rule.* To complete bidding in the auction within a reasonable time, the Bureaus propose to employ a simultaneous stopping rule approach for Auction 100, which means all construction permits remain available for bidding until bidding stops on every construction permit. Specifically, bidding would close on all construction permits after the first round in which no bidder submits any new bids, no bidder applies a proactive waiver, or, if bid withdrawals are permitted in this auction, no bidder withdraws any provisionally winning bid which is a bid that would become a final winning bid if the auction were to close in that given round. Thus, unless the Bureaus announce alternative procedures, under the proposed simultaneous stopping approach bidding would remain open on all construction permits until bidding stops on every construction permit. Consequently, it is not possible to determine in advance how long the bidding in this auction will last.

18. Further, the Bureaus propose to retain the discretion to exercise any of the following options

during Auction 100. (1) Use a modified version of the simultaneous stopping rule that would close the auction for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder places any new bid on a construction permit for which it is not the provisionally winning bidder, which means that, absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule. (2) Use a modified version of the simultaneous stopping rule that would close the auction for all construction permits after the first round in which no bidder applies a waiver, no bidder withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or no bidder places any new bid on a construction permit that already has a provisionally winning bid, which means that, absent any other bidding activity, a bidder placing a new bid on an FCC-held construction permit (a construction permit that does not already have a provisionally winning bid) would not keep the auction open under this modified stopping rule. (3) Use a modified version of the simultaneous stopping rule that combines options (1) and (2). (4) The auction would close after a specified number of additional rounds (special stopping rule) to be announced by the Bureaus. If the Bureaus invoke this special stopping rule, they will accept bids in the specified final round(s), after which the auction will close. (5) The auction would remain open even if no bidder places any new bid, applies a waiver, or withdraws any provisionally winning bid (if withdrawals are permitted in this auction). In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

19. The Bureaus propose to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely. Before exercising these options, the Bureaus are likely to attempt to change the pace of the auction. For example, the Bureaus may adjust the pace of bidding by changing the number of bidding rounds per day and/or the minimum acceptable bids. The Bureaus proposed to retain the discretion to



exercise any of these options with or without prior announcement during the auction. The Bureaus seek comment on these proposals.

20. *Auction Delay, Suspension or Cancellation.* Pursuant to 47 CFR 1.2104(i), the Bureaus propose that they may delay, suspend, or cancel bidding in Auction 100 in the event of a natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. The Bureaus would notify participants of any such delay, suspension or cancellation by public notice and/or through the FCC auction bidding system's announcement function. If bidding is delayed or suspended, the Bureaus may, in their sole discretion, elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureaus to delay or suspend the auction. The Bureaus emphasized that they will exercise this authority solely at their discretion, and not as a substitute for situations in which bidders may wish to apply activity rule waivers. The Bureaus seek comment on this proposal.

## **B. Auction Procedures**

21. *Upfront Payments and Bidding Eligibility.* The Bureaus have determined an appropriate upfront payment for each construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar construction permits. The upfront payment is a refundable deposit made by an applicant to establish eligibility to bid on construction permits. Upfront payments that are related to the specific construction permits being auctioned protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of bidding. With these considerations in mind, the Bureaus proposed the upfront payments set forth in Attachment A of the Auction 100 Comment Public Notice. The Bureaus seek comment on the upfront payments specified in that Attachment A.

22. The Bureaus further propose that the amount of the upfront payment submitted by a bidder will determine its initial bidding eligibility in bidding units. The Bureaus propose to assign each construction permit a specific number of bidding units, equal to one bidding unit per dollar of the upfront

payment listed in Attachment A of the Auction 100 Comment Public Notice. The number of bidding units for a given construction permit is fixed and does not change during the auction as prices change. If an applicant is found to be qualified to bid on more than one permit in Auction 100, such a bidder may place bids on multiple construction permits, provided that the total number of bidding units associated with those construction permits does not exceed the bidder's current eligibility. A bidder cannot increase its eligibility during the auction; it can only maintain its eligibility or decrease its eligibility. Thus, in calculating its upfront payment amount and hence its initial bidding eligibility, an applicant must determine the maximum number of bidding units on which it may wish to bid (or hold provisionally winning bids) in any single round, and submit an upfront payment amount covering that total number of bidding units. The Bureaus request comment on these proposals.

23. *Activity Rule.* To ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. The Bureaus propose a single stage auction with the following activity requirement: In each round of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on 100 percent of its bidding eligibility. A bidder's activity in a round will be the sum of the bidding units associated with any construction permits upon which it places bids during the current round and the bidding units associated with any construction permits for which it holds provisionally winning bids. Failure to maintain the requisite activity level would result in the use of an activity rule waiver, if any, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction. The Bureaus seek comment on this proposal.

24. *Activity Rule Waivers and Reducing Eligibility.* For the proposed simultaneous multiple round auction format, the Bureaus propose that when a bidder's eligibility in the current round is below the required minimum level, it may preserve its current level of eligibility through an activity rule waiver, if available. An activity rule waiver applies to an entire round of bidding, not to a particular construction permit. Activity rule waivers can be either proactive or automatic. Activity rule waivers are principally a mechanism for a bidder to avoid the loss of bidding eligibility if exigent circumstances prevent it from

bidding in a particular round.

25. The FCC auction bidding system will assume that a bidder that does not meet the activity requirement would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round in which a bidder's activity is below the minimum required unless (1) the bidder has no activity rule waivers remaining or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the activity requirement. If a bidder has no waivers remaining and does not satisfy the required activity level, the bidder's current eligibility will be permanently reduced, possibly curtailing or eliminating the ability to place additional bids in the auction.

26. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the reduce eligibility function in the FCC auction bidding system. In this case, the bidder's eligibility would be permanently reduced to bring it into compliance with the specified activity requirement. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder cannot regain its lost bidding eligibility.

27. Under the proposed simultaneous stopping rule, a bidder may apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a bidder proactively were to apply an activity rule waiver (using the proactive waiver function in the FCC auction bidding system) during a bidding round in which no bids are placed or withdrawn (if bid withdrawals are permitted in this auction), the auction would remain open and the bidder's eligibility would be preserved. An automatic waiver applied by the FCC auction bidding system in a round in which there are no new bid, no bid withdrawal (if bid withdrawals are permitted in this auction), or no proactive waiver would not keep the auction open. The Bureaus propose that each bidder in Auction 100 be provided with three activity rule waivers that may be used at the bidder's discretion during the course of the auction. The Bureaus seek comment on this proposal.

28. *Reserve Price or Minimum Opening Bids.* Normally, a reserve price is an absolute

minimum price below which a construction permit or license will not be sold in a given auction. The Bureaus did not propose to establish separate reserve prices for the Auction 100 construction permits.

29. A minimum opening bid is the minimum bid price set at the beginning of the auction below which no bids are accepted. Because it is an effective tool for accelerating the competitive bidding process, the Bureaus propose minimum opening bid amounts for Auction 100 determined by taking into account the type of service and class of facility offered, market size, population covered by the proposed broadcast facility, and recent broadcast transaction data. Attachment A of the Auction 100 Comment Public Notice lists a proposed minimum opening bid amount for each construction permit available in Auction 100. Consistent with 47 U.S.C. 309(j)(4)(f), the Bureaus seek comment on the minimum opening bid amounts specified in Attachment A of the Auction 100 Comment Public Notice.

30. If commenters believe that these minimum opening bid amounts will result in unsold construction permits, are not reasonable amounts, or should instead operate as reserve prices, they should explain why this is so and comment on the desirability of an alternative approach. The Bureaus ask commenters to support their claims with valuation analyses and suggested amounts or formulas for reserve prices or minimum opening bids. In establishing the minimum opening bid amounts, the Bureaus particularly seek comment on factors that could reasonably have an impact on bidders' valuation of the broadcast spectrum, including the type of service offered, market size, population covered by the proposed broadcast facility, and any other relevant factors.

31. *Bid Amounts.* The Bureaus propose that, if the bidder has sufficient eligibility to place a bid on a particular construction permit in a round, an eligible bidder will be able to place a bid on that construction permit in any of up to nine different amounts. In the event of duplicate bid amounts due to rounding, the FCC auction system will omit the duplicates and will list fewer than nine acceptable bid amounts for that construction permit. Under this proposal, the FCC auction bidding system interface will list the acceptable bid amounts for each construction permit.

32. The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid

amount until there is a provisionally winning bid for the construction permit. After there is a provisionally winning bid for a construction permit, the minimum acceptable bid amount will be a certain percentage higher. The percentage used for this calculation, the minimum acceptable bid increment percentage, is multiplied by the provisionally winning bid amount, and the resulting amount is added to the provisionally winning bid amount. If, for example, the minimum acceptable bid increment percentage is 10 percent, then the provisionally winning bid amount is multiplied by 10 percent. The result of that calculation is added to the provisionally winning bid amount, and that sum is rounded using the Commission's standard rounding procedure for auctions. If bid withdrawals are permitted in this auction, in the case of a construction permit for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the construction permit.

33. The eight additional bid amounts would be calculated using the minimum acceptable bid amount and an additional bid increment percentage. The minimum acceptable bid amount is multiplied by the additional bid increment percentage, and that result, rounded, is the additional increment amount. The first additional acceptable bid amount equals the minimum acceptable bid amount plus the additional increment amount. The second additional acceptable bid amount equals the minimum acceptable bid amount plus two times the additional increment amount; the third additional acceptable bid amount is the minimum acceptable bid amount plus three times the additional increment amount; etc. If, for example, the additional bid increment percentage is 5 percent, then the calculation of the additional increment amount is (minimum acceptable bid amount) \* (0.05), rounded. The first additional acceptable bid amount equals (minimum acceptable bid amount) + (additional increment amount); the second additional acceptable bid amount equals (minimum acceptable bid amount) + (2 \*(additional increment amount)); the third additional acceptable bid amount equals (minimum acceptable bid amount) + (3 \*(additional increment amount)); etc. The Bureaus will round the results using the Commission's standard rounding procedures for auctions.

34. For Auction 100, the Bureaus propose to use a minimum acceptable bid increment percentage of 10 percent. This means that the minimum acceptable bid amount for a construction permit will be approximately 10 percent greater than the provisionally winning bid amount for the construction permit. To calculate the additional acceptable bid amounts, the Bureaus propose to use an additional bid increment percentage of 5 percent. The Bureaus seek comment on these proposals.

35. Consistent with past practice, the Bureaus propose to retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid increment percentage, the additional bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate. Further, the Bureaus propose to retain the discretion to do so on a construction-permit-by-construction-permit basis. The Bureaus also propose to retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, the Bureaus could set a \$1,000 limit on increases in minimum acceptable bid amounts over provisionally winning bids. Thus, if calculating a minimum acceptable bid using the minimum acceptable bid increment percentage results in a minimum acceptable bid amount that is \$1,200 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$1,000 above the provisionally winning bid. The Bureaus seek comment on the circumstances under which the Bureaus should employ such a limit, factors the Bureaus should consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters, such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts. If the Bureaus exercise this discretion, they will alert bidders by announcement in the FCC auction bidding system during the auction. The Bureaus seek comment on these proposals

36. *Provisionally Winning Bids.* Provisionally winning bids are bids that would become winning bids if the auction were to close in that given round. At the end of each bidding round, the FCC auction bidding system will determine a provisionally winning bid for each construction permit based on

the highest bid amount received for that permit. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round. Provisionally winning bids become the winning bid at the end of the auction.

37. The auction bidding system assigns a pseudo-random number to each bid when the bid is entered. If identical high bid amounts are submitted on a construction permit in any given round (i.e., tied bids), the FCC auction bidding system will use a pseudo-random number generator to select a single provisionally winning bid from among the tied bids. The tied bid with the highest pseudo-random number wins the tiebreaker and becomes the provisionally winning bid. The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to close with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. If the construction permit receives any bids in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

38. A provisionally winning bid will be retained until there is a higher bid on the construction permit at the close of a subsequent round, unless the provisionally winning bid is withdrawn (if bid withdrawals are permitted in this auction). As a reminder, provisionally winning bids count toward a bidder's activity level for purposes of the activity rule.

39. *Bid Removal and Bid Withdrawal.* The FCC auction bidding system allows each bidder to remove any of the bids it placed in a round before the close of that round. By removing a bid placed within a round, a bidder effectively unsubmits the bid. A bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder is no longer permitted to remove a bid.

40. The Bureaus seek comment on whether bid withdrawals should be permitted in Auction 100. When permitted in an auction, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder would be able to withdraw its provisionally winning bids using the withdraw function in the FCC auction bidding

system. A bidder that withdraws its provisionally winning bid(s), if permitted in this auction, is subject to the bid withdrawal payment provisions of 47 CFR 1.2104(g) and 1.2109.

41. Based on the stand-alone nature of FM translator facilities and the Auction 100 limit of one FM translator station proposal per AM station, as well as the experience of the Bureaus with past auctions of broadcast construction permits, the Bureaus propose to prohibit bidders from withdrawing any bid after the close of the round in which that bid was placed. The Bureaus made this proposal in light of the site- and applicant-specific nature and wide geographic dispersion of the permits available in this closed auction, all of which suggest that potential applicants for this auction will not need to use the auction process to aggregate construction permits (as compared with bidders in many auctions of wireless licenses). Thus, the Bureaus believe that it is unlikely that bidders will have a need to withdraw bids in this auction. Also, allowing bid withdrawals may encourage insincere bidding or increase opportunities for anti-competitive bidding in certain circumstances. The Bureaus also remain mindful that bid withdrawals, particularly those made late in this auction, could result in delays in licensing new cross-service FM translator stations and attendant delays in the offering of new broadcast service to the public. The Bureaus seek comment on their proposal to prohibit bid withdrawals in Auction 100.

### **C. Post-Auction Payments**

42. *Interim Withdrawal Payment Percentage.* A bidder that withdraws a bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or a subsequent auction. However, if a construction permit for which a bid has been withdrawn does not receive a subsequent higher bid or winning bid in the same auction, the FCC cannot calculate the final withdrawal payment until that construction permit receives a higher bid or winning bid in a subsequent auction. In such cases, when that final withdrawal payment cannot yet be calculated, in accordance with 47 CFR 1.2104(g)(1) the FCC imposes on the bidder responsible for the withdrawn bid an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed.

43. Pursuant to 47 CFR 1.2104(g)(1), the amount of the interim bid withdrawal payment may



range from 3 to 20 percent of the withdrawn bid amount. If the Bureaus allow bid withdrawals in Auction 100, the Bureaus propose that the interim bid withdrawal payment be 20 percent of the withdrawn bid amount. The Bureaus request comment on using 20 percent for calculating an interim bid withdrawal payment amount in Auction 100. Commenters advocating the use of bid withdrawals in Auction 100 should also address the percentage of the interim bid withdrawal payment.

44. *Additional Default Payment Percentage.* Any winning bidder that defaults or is disqualified after the close of an auction (i.e., fails to remit the required down payment by the specified deadline, fails to submit a timely long-form application, fails to make full and timely final payment, or is otherwise disqualified) is liable for a default payment under 47 CFR 1.2104(g)(2). This default payment consists of a deficiency payment equal to the difference between the amount of the Auction 100 bidder's winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less. Based on the nature of the service and the construction permits being offered, the Bureaus propose for Auction 100 an additional default payment amount of 20 percent of the applicable winning bid. The Bureaus seek comment on this proposal.

## **VI. PROCEDURAL MATTERS**

### **A. Initial Paperwork Reduction Act of 1995 Analysis**

45. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198. See 44 U.S.C. 3506(c)(4).

### **B. Supplemental Initial Regulatory Flexibility Analysis**

46. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 603, the Commission prepared Initial Regulatory Flexibility Analyses (IRFAs) as part of the 1997 Broadcast Competitive Bidding Notice of Proposed Rulemaking (NPRM) and other Commission notices

(collectively, Broadcast Competitive Bidding NPRMs) pursuant to which Auction 100 will be conducted. Final Regulatory Flexibility Analyses (FRFAs) likewise were prepared in the 1998 Broadcast First Report and Order and other Commission rulemaking orders (collectively, Broadcast Competitive Bidding Orders). The Bureaus have prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules addressed in the Auction 100 Comment Public Notice, to supplement the Commission's Initial and Final Regulatory Flexibility Analyses completed in the Broadcast First Report and Order and other Commission orders pursuant to which Auction 100 will be conducted. Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the same filing deadline for comments specified on the first page of the Auction 100 Comment Public Notice. The Commission will send a copy of the Public Notice, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), 5 U.S.C. 603(a).

47. *Need for, and Objectives of, the Proposed Rules.* In addition to providing notice of proposed procedures in the Auction 100 Comment Public Notice, consistent with 47 U.S.C. 309(j)(3)(E)(i), the Bureaus intend to provide adequate time for participants to comment on proposed procedures to govern Auction 100, an auction of up to 13 cross-service FM translator construction permits. To promote the efficient and fair administration of the competitive bidding process for all Auction 100 participants, including small businesses, the Bureaus seek comment on the following proposed procedures: (1) Whether certain aspects of the rules governing auction applications should be waived or modified in conjunction with the Bureaus' prior decision to allow eligible AM licensees having any of the same controlling interest in common to file separate auction applications (Forms 175), rather than a single Form 175; (2) Use of a simultaneous multiple-round auction format, consisting of sequential bidding rounds with a simultaneous stopping rule (with discretion by the Bureaus to exercise alternative stopping rules under certain circumstances); (3) A specific minimum opening bid amount for each construction permit available in Auction 100; (4) A specific upfront payment amount for each construction permit; (5)

Establishment of a bidder's initial bidding eligibility in bidding units based on that bidder's upfront payment through assignment of a specific number of bidding units for each construction permit; (6) Use of an activity rule that would require bidders to bid actively during the auction rather than waiting until late in the auction before participating; (7) A single stage auction in which a bidder is required to be active on 100 percent of its bidding eligibility in each round of the auction; (8) Provision of three activity rule waivers for each bidder to allow it to preserve bidding eligibility during the course of the auction; (9) Use of minimum acceptable bid amounts and additional bid increments, along with a proposed methodology for calculating such amounts, with the Bureaus retaining discretion to change their methodology if circumstances dictate; (10) A procedure for breaking ties if identical high bid amounts are submitted on a permit in a given round; (11) Bid removal procedures; (12) Whether to permit bid withdrawals; (13) Establishment of an interim bid withdrawal percentage of 20 percent of the withdrawn bid in the event the Bureaus allow bid withdrawals in Auction 100; and (14) Establishment of an additional default payment of 20 percent under 47 CFR 1.2104(g)(2) in the event that a winning bidder defaults or is disqualified after the auction.

48. *Legal Basis.* The Commission's statutory obligations to small businesses participating in a spectrum auction under the Communications Act of 1934, as amended (the Act), are found in 47 U.S.C. 309(j)(3)(B) and 309(j)(4)(D). The statutory basis for the Commission's competitive bidding rules is found in various provisions of the Act, including 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), 303(r), 304, 307, and 309(i). The Commission has established a framework of competitive bidding rules pursuant to which it has conducted auctions since the inception of the auction program in 1994 and would conduct Auction 100. In promulgating those rules, the Commission conducted numerous Regulatory Flexibility Act analyses to consider the possible impact of competitive bidding rules on small businesses that might seek to participate in Commission auctions. The Commission has directed the Bureaus, under delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of bidding in each auction.

49. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted, 5 U.S.C. 603(b)(3). The RFA generally defines the term small entity as having the same meaning as the terms small business, small organization, and small government jurisdiction, 5 U.S.C. 601(6). In addition, the term small business has the same meaning as the term small business concern under the Small Business Act, 15 U.S.C. 632. A small business concern is one which: (1) Is independently owned and operated, (2) is not dominant in its field of operation, and (3) satisfies any additional criteria established by the SBA, 5 U.S.C. 632.

50. The specific procedures and minimum opening bid amounts on which comment is sought in the Auction 100 Comment Public Notice will affect directly all applicants participating in Auction 100. There are a maximum of 25 individuals or entities that may become qualified bidders in Auction 100, in which applicant eligibility is closed. Therefore, the specific competitive bidding procedures and minimum opening bid amounts described in the Auction 100 Comment Public Notice will affect only the 25 individuals or entities listed in Attachment A to that Public Notice and who are the only parties eligible to complete the remaining steps to become qualified to bid in Auction 100. These specific 25 Auction 100 individuals or entities include firms of all sizes.

51. *Radio Stations.* This Economic Census category comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts. Economic Census data for 2012 shows that 2,849 radio station firms operated during that year. Of that number, 2,806 firms operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 and 26 with annual receipts of \$50 million or more. Therefore, based on the SBA's size standard, the majority of such entities are small entities.

52. According to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Radio Database as of September 6, 2018, about 11,024 (or about 99.92 percent) of 11,033 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Bureaus note, however, that the SBA size standard data does not enable the Bureaus to make a meaningful estimate of the number of small entities who may participate in Auction 100.

53. In assessing whether a business entity qualifies as small under the SBA definition, business control affiliations must be included. The Bureaus' estimate therefore likely overstates the number of small entities that might be affected by its action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. Moreover, the definition of small business also requires that an entity not be dominant in its field of operation and that the entity be independently owned and operated. The estimate of small businesses to which Auction 100 competitive bidding rules may apply does not exclude any radio station from the definition of a small business on these bases and is therefore over-inclusive to that extent. Furthermore, the Bureaus are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. In addition, the Bureaus note that it is difficult to assess these criteria in the context of media entities and therefore estimates of small businesses to which they apply may be over-inclusive to this extent.

54. The Bureaus also note that they are unable to accurately develop an estimate of how many of these 25 individuals or entities in Auction 100 are small businesses based on the number of small entities that applied to participate in prior broadcast auctions because that information is not collected from applicants for broadcast auctions in which bidding credits are not based on an applicant's size (as is the case in auctions of licenses for wireless services). Due to specific eligibility criteria adopted in a 2015 Commission rulemaking order, potential eligible bidders in Auction 100 include existing holders of broadcast station construction permits or licenses. In 2013, the Commission estimated that 97 percent of radio broadcasters met the SBA's prior definition of small business concern, based on annual revenues of

\$7 million. The SBA has since increased that revenue threshold to \$38.5 million, which suggests that an even greater percentage of radio broadcasters would fall within the SBA's definition at 13 CFR 121.201. Based on Commission staff review of BIA/Kelsey, LLC's Media Access Pro Radio Database, 4,626 (99.94%) of 4,629 AM radio stations have revenue of \$38.5 million or less. Accordingly, based on this data, the Bureaus conclude that the majority of Auction 100 eligible bidders would likely meet the SBA's definition of a small business concern.

55. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.* In the Auction 100 Comment Public Notice, the Bureaus propose no new reporting, recordkeeping, or other compliance requirements for small entities or other auction applicants. The Commission designed the auction application process itself to minimize reporting and compliance requirements for applicants, including small business applicants. In the first part of the Commission's two-phased auction application process, parties desiring to participate in an auction file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. Eligibility to participate in bidding is based on an applicant's short-form application and certifications, as well as its upfront payment. In the second phase of the process, there are additional compliance requirements for winning bidders. Thus, a small business that fails to become a winning bidder does not need to file a long-form application and provide the additional showings and more detailed demonstrations required of a winning bidder.

56. *Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities, 5 U.S.C. 603(c)(1)-(4).

57. The Bureaus intend that the proposals of the Auction 100 Comment Public Notice to facilitate participation in Auction 100 will result in both operational and administrative cost savings for small entities and other auction participants. In light of the numerous resources that will be available from the Commission at no cost, the processes and procedures proposed in the Auction 100 Comment Public Notice should result in minimal economic impact on small entities. For example, prior to the auction, the Commission will hold a mock auction to allow eligible bidders the opportunity to familiarize themselves with both the bidding processes and systems that will be used in Auction 100. During the auction, participants will be able to access and participate in bidding via the Internet using a web-based system, or telephonically, providing two cost-effective methods of participation and avoiding the cost of travel for in-person participation. Further, small entities as well as other auction participants will be able to avail themselves of telephone hotlines for assistance with auction processes and procedures as well as technical support hotlines to assist with issues such as access to or navigation within the electronic FCC Form 175 and use of the FCC's auction system. In addition, all auction participants, including small business entities, will have access to various other sources of information and databases through the Commission that will aid in both their understanding of and participation in the process. These mechanisms are made available to facilitate participation in Auction 100 by all eligible bidders and may result in significant cost savings for small business entities who utilize these mechanisms. These steps, coupled with the advance description of the bidding procedures in Auction 100, should ensure that the auction will be administered efficiently and fairly, thus providing certainty for small entities as well as other auction participants.

58. These proposed procedures for the conduct of Auction 100 constitute the more specific implementation of the competitive bidding rules contemplated by 47 CFR parts 1 and 73 and the underlying rulemaking orders, including the Broadcast First Report and Order and relevant competitive bidding orders, and are fully consistent therewith.

59. *Federal Rules that May Duplicate, Overlap or Conflict with the Proposed Rules.* None.

**C. Ex Parte Rules**

60. This proceeding has been designated as a permit-but-disclose proceeding in accordance with the Commission's ex parte rules. While additional information is provided in the Auction 100 Comment Public Notice on the relevant reporting requirements, participants in Auction 100 should familiarize themselves with the Commission's ex parte rules.

Federal Communications Commission.

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